THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, MAY 21, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

JUDGE DILLON will sail for Europe on the 26th instant, and will probably be absent during the summer months. This step has been determined upon with the view of recruiting his health, which has been considerably impaired by overwork. Mr. Justice Miller will remain in the circuit during Judge Dillon's absence.

THE BRIGHAM YOUNG DIVORCE SUIT.—Judge Lowe, the new Chief Justice of Utah territory, has just rendered a decision in this celebrated case, denying an attachment against the defendant to compel payment of $500 per month alimony, *pendente lite*, as awarded by ex-Chief Justice McKean. The decision proceeds on the ground that, in cases of divorce, alimony can not be allowed unless a valid marriage is either first admitted or proved. The defendant had alleged in his answer that the marriage in question was a polygamous one, and the allegations, not being denied, must be taken as true. The Chief Justice is reported to have said, it would be strange, if, under these circumstances, it could be imposed upon a court of equity to direct or enforce payment of alimony, and thus bestow apparent, if not, indeed, real, sanction of the law upon a practice which is hostile to the civilization of the age, and which the penal statutes of the land visit with punishment. This is sound law and good sense.

NASHVILLE BAR ASSOCIATION.—The leading members of the Nashville bar have formed a bar association, with Chancellor Cooper as president; Thomas H. Malone and D. W. Peabody, vice-presidents; J. A. Cartwright, secretary and treasurer; G. P. Thurston, John Ruhm and Robert L. Morris, executive committee; and Morton B. Howell, N. D. Malone and Thomas M. Steger, committee on admissions. It is proposed to establish a bar library. We should suppose it would be more judicious to enter into some arrangement with the state, by which the strength of the association could be exerted in completing the law department of the state library at Nashville. The establishment and maintenance of a law library is no easy task to be entered upon by the bar of a city no larger than Nashville. To illustrate this we may state that the Saint Louis Law Library Association has about 350 members; and yet the support of their library requires an initiation fee of twenty dollars, and an annual fee of ten dollars; and then, after an existence of about thirty years, it can not be said to have reached an independent basis. Its library room is still furnished, and its gas bills paid, by Saint Louis county.

THE DOG TREADMILL CASE.—"Confine your remarks to the dog-fight," was the peremptory admonition of a country justice to a newly fledged lawyer who was making a spread-eagle speech. This reminds us that a case has just been determined in the Supreme Court of New York (People *ex rel.* Walker v. The Court of General Sessions), involving the question of the right of a man to treat his dog according to the dictates of his own (not the dog's) conscience. The relator, Walker, was convicted in the court of general sessions and fined $25 for cruelly treating his dog while working him on a treadmill. This conviction the supreme court has unanimously affirmed. Davis, J., who delivered the opinion is reported to have said:

"On the merits of this case there appears to be no reason for interfering with the judgment. Although 'a dog is not a beast of burden,' yet it is not cruelty to train and subject him to any useful purpose. His use upon a 'treadmill' or an 'inclined plane,' or in any mode by which his strength or docility may be made serviceable to man is commendable and not criminal, but his abuse while so employed, whenever it amounts to cruelty, is a crime, and punishable precisely under the same circumstances as the cruel usage of the higher animals. Evidence enough was given on the part of the prosecution, to show harsh and unreasonable treatment by the relator of his dog, producing unnecessary pain and suffering, and it was for the court below to determine from the conflicting evidence, whether the alleged cruelty was established. We think the suit should be dismissed, and the proceedings of the special sessions affirmed."

DEATH OF BARON PIGOTT.—Sir Gillery Pigott, a baron of the English Court of Exchequer, died on the 28th of April, from the effects of injuries received by being thrown from a horse some time before. Baron Pigott was the fourth of the seven sons of the late Paynton Pigott Stainsby-Conant, Esq., of Archer Lodge, Sherfield, Hampshire, by Lucy, second daughter of the late Richard Drope Gough, Esq., of Souldern, Oxon, and was born in the year 1813. The learned judge, who was therefore sixty-two years of age, received his education at a private school at Putney, under the Rev. W. Carmalt, and was called to the bar by the honorable society of the Middle Temple, in Easter Term, 1839. He joined the Oxford Circuit, and also attended the Gloucester Sessions. In 1856 he was made a Serjeant-at-Law, receiving a patent of precedence, and in 1859 he was appointed Recorder of Hereford. He entered parliament in October, 1860, in the Liberal interest, as one of the members for Reading, in the place of his brother, Mr. Francis Pigott, who had been nominated to the post of Governor of the Isle of Man; his parliamentary career, however, was but of short duration, for in 1863 he was appointed by the late Lord Westbury to a judgeship in the Court of Exchequer, in succession to the present Lord Penzance, who had taken Sir Cresswell Cresswell's place in the Divorce Court, and at the same time received the customary honor of knighthood. A few weeks ago, when the Lord Chief Baron was suffering from illness, Mr. Baron Pigott relieved him on the Western Circuit, and he was to have tried the Norwich election petition next week. The announcement of his death, which was made by the Lord Chief Baron, in the Court of Exchequer, came upon the bar, as well as upon the public, with surprise.

The Association for the Reform and Codification of the Law of Nations.

This association resolved at its last meeting to direct attention to the following objects: 1. Bills of Exchange. 2. Foreign Judgments. 3. Copyright. 4. Patent Law. 5. Trade Marks. These subjects will be dealt with one by one. The following questions have been submitted to chambers of

commerce, bankers, bill brokers, jurists, and mercantile houses in different countries, in order to elicit their opinions as to the desirability of adopting one uniform system in the laws, usages, and forms as to the bills of exchange:

1. Do you find such diversity in the laws, customs and regulations affecting bills of exchange in various countries with which you have intercourse, as to cause complications in commercial business, and create questions of legal difficulty in establishing and enforcing your rights and remedies?

2. Do you consider it desirable to adopt one universal form of bill of exchange, and one uniform system of laws regulating the rights and liabilities of parties to a bill of exchange?

3. What difficulties do you find in the present fiscal regulations respecting stamps on foreign bills, and in the laws relating thereto; and what suggestions do you make for the removal of such difficulties?

4. Do you consider it desirable to establish one uniform form and system of endorsement, which shall only be limited in case of express directions by an endorser?

5. Do you deem it desirable that the usances now varying in different places and countries should be altogether abolished, and that the adoption of one uniform period of time would be preferable?

6. Having regard to the great diversity of custom, at present leading to great complications, do you consider that days of grace should be abolished entirely, or if not, that a uniform term should be established, and if so, what term?

7. Have you experienced difficulties from diversity in the practice, laws and customs of various countries, as to presentation for acceptance, and the consequences arising on non-acceptance, refusal or undue delay?

Do you consider it desirable that there should be a uniformity of practice, custom and law in regard thereto?

8. Do you find difficulties in the present system of notice either as to form or law, or as to the parties upon whom it should be served; and can you suggest any simplification or alteration in regard thereto, or in the proof of due notice?

9. Is noting and protest as to foreign bills of exchange compulsory under your law?

Have you in your country any regulated scale of charges on noting and protest? If so, please give full details thereof, both as regards inland and foreign bills?

Do you find that the expenses of noting and protest, and incidental charges on foreign bills returned dishonored, are variable and burdensome, and what changes (if any) in the present system and rate of charges do you deem desirable?

10. What rights and remedies are, under your laws, secured to a holder of a foreign bill of exchange by due notice and protest?

Is there any limitation as to the election of parties, or the time for inception of legal proceedings?

Have you any suggestions to make for the better securing the rights and remedies in other countries of holders of foreign bills?

11. What is the limit of time in your country in which a suit must be brought, and do you consider it desirable to fix a uniform period?

12. Is the law or custom of Aval in force in your country?

Do you find difficult questions arising in countries where no such law or custom exists, and do you consider it desirable generally to adopt a system recognizing the validity of Aval.

13*a*. Does the law in your country sustain the right of a *bona fide* holder for value of bills of exchange, lost or forged? Is this right upheld even in those cases in which loss is caused by gross neglect, such as a want of due care and caution on the part of a person losing a bill or from whose possession a bill has been abstracted?

b. What diligence do you deem necessary on the part of bankers issuing circular notes and letters of credit—and of the holders of bills of exchange, to prevent the circulation of lost and forged notes and bills?

c. What alteration in, or assimilation of the laws of commercial countries generally, do you suggest as a protection to the banking and commercial community in respect of lost or forged bills of exchange and letters of credit?

The last three questions have reference particularly to letters of credit and circular notes, since large frauds are being continually committed upon, and losses sustained by bankers, money changers, and others, either by the production of forged letters of credit or letters of indication, or by passing off lost or stolen bank or circular notes,

Answers to these questions may be addressed to the Honorary International Secretaries, H. D. Jencken, Goldsmith Building, Temple, London; and J. Rand Bailey, 8 Tokenhouse Yard, London.

The next annual meeting of the Association will take place at the Hague, on the first week in September next.

The Missouri Constitutional Convention.

A careful perusal of the second week's work of this body has left upon our minds an impression which we can only convey to our readers by asking them to suppose that a steamer named the Constitution should, after ten years' service, be pulled out of the Missouri river at Jefferson City for repairs; that sixty-eight men, from different parts of the state, some of them carpenters, some blacksmiths, some shoemakers and some politicians, should be chosen to perform the task; that these sixty-eight men should, without a foreman, each one assuming as far as possible to boss the job, and no two agreeing as to the nature of the repairs which ought to be made, attack the old carcass simultaneously, and proceed, with an incessant din of hammer and adze, to the work of demolition and rehabilitation. Suppose, further, that each of these workmen should bring to the yard a different kind of wood—some oak, some hickory, some pine, some basswood, and that none would agree to consider the repairs complete unless he should succeed in getting into the diseased frame at least one plank or piece of his own kind of timber and joined and patched to his own notion.

Not dissimilar to this are the repairs which are now going on upon the constitution of Missouri. That instrument is simultaneously attacked by a body of lawyers, politicians, farmers and merchants, not a dozen of whom appear to have any adequate idea of the nature of the repairs needed; and yet each one is apparently determined not to look his admiring constituents in the face without being able to say that some one, at least, of the provisions of the new instrument was of his own concocting.

One of the members, Judge Adams, formerly of the Supreme Court of Missouri, had the hardihood to submit to the convention a complete draft of a constitution, the framing of which had, no doubt, cost him much time and labor. We have not had the pleasure of seeing this document, but we venture the opinion that if the convention had, as a matter of hit or miss, adopted it and adjourned, they would have presented to the people an instrument as satisfactory as they will if they labor from now until Christmas.

It would consume the entire space of this issue of the JOURNAL were we to enumerate the thousand and one propositions, some of them wise and some of them foolish, which have been made by the various members. Still, there are in the convention a number of able and experienced lawyers, and if the wisdom of these shall succeed in checking the vanity of the little men who are associated with them, its deliberations may result in much good. At all events it would be highly unwise and unjust to prejudge its action.

The only substantial work reported from committee down to the time of this writing was the report by Mr. Gantt of Saint Louis, of a preamble and bill of rights, from the committee to which that subject had been referred. We do not see much in it that we would wish to see changed. It opens

with a proper acknowledgement of gratitude to the Supreme Ruler of the Universe; recites, among other provisions deserving special mention, that acts of immorality may be punished notwithstanding religious belief be alleged in excuse of them; prohibits the appropriation of public moneys in aid of religious sects; prohibits the gift, sale or devise of land to priests, ministers or religious sects; prohibits, with certain exceptions, proceedings by information in criminal cases; taxes all private property (as distinguished from state or municipal), except such as is used exclusively for the interment of the bodies of deceased persons; prohibits the general assembly from exempting property from taxation; preserves the right to keep and bear arms, but without justifying the practice of wearing concealed weapons; provides that in taking private property for public use, the question what is public use shall be a judicial question; provides that in such cases there shall be no abatement of damages for real or supposed benefits; and recites that the writ of *habeas corpus* shall *never* be suspended. The provision against priests, ministers and religious denominations, as such, taking property, seems to us too sweeping. Religious societies ought obviously to be permitted to take and hold property sufficient for the erection of suitable places of worship, of a pastor's residence, and for the maintenance of suitable burying grounds.

We could wish that the convention could devise some plan for a weekly distribution to the press of a limited number of printed sheets containing an official report of its debates.

CASES IN THIS NUMBER.—We print in this number a very important decision of Mr. District Judge Erskine, of the federal courts of Georgia, in the case of Bridge, ruling two points: 1. That the state courts can not punish perjury committed in the federal courts. 2. That if they assume to do so, a federal district judge may, on *habeas corpus*, enlarge the convict from the state penitentiary. It will be seen that the learned judge places the question on the broad ground that perjury in a federal tribunal is an offence against a jurisdiction foreign to that of the state, and can only be punished by the jurisdiction against which it was committed. Upon this point there would seem to be no doubt; but grave doubts attend the solution of the question whether a federal judge can throw open the doors of a state penitentiary for the purpose of enlarging prisoners confined there under the sentence of a duly constituted court of the state. Whatever may be said to the contrary, the assertion of such a power invades the right of the state to the custody of its own criminals, and of its courts to determine their own jurisdiction. The reasoning of the learned judge is, however, very persuasive, if not conclusive. We learn that the case will be reviewed by Mr. Justice Bradley.

Another decision of unusual importance is that of Mr. Circuit Judge Dillon in the United States Circuit Court for the District of Iowa, in the case of The Chicago, Burlington and Quincy Railroad Company v. The Attorney-General, which relates to the power of a state to regulate the tolls of railway companies. It will be seen that the case rests upon two considerations: 1. That the charter of the plaintiffs' lessor did not grant the right exclusively to regulate its own compensation. 2. That if this right had been granted, it was surrendered up by accepting a land grant in which the state reserved the power of making rules and regulations for the management of the road.

In the opinion of Mr. Circuit Judge Woods, in Hitchcock v. Galveston, will be found an able exposition of several questions relating to contracts for municipal improvements.

Punishment by State Courts of Perjury, Committed in Federal Courts — Habeas Corpus.

EX PARTE DOCK BRIDGES.

Northern District of Georgia: At Chambers.

Before Hon. JOHN ERSKINE, United States District Judge, for the District of Georgia, April 10, 1875.

The petitioner was tried, convicted and confined in the penitentiary, by one of the state courts of Georgia, for a perjury alleged to have been committed in testifying before a United States commissioner in a preliminary examination of a person charged with obstructing the right of a citizen to vote, in contravention of the Enforcement Act (R. S. §§ 5,506 *et seq.*): *Held*, 1. That the courts of the states have no jurisdiction to try a citizen for perjury, committed in the federal tribunals. 2. That if a person is tried in a state court on such a charge, and convicted and imprisoned in the state penitentiary, he may be enlarged by a federal district judge, under the *habeas corpus* act of February 5, 1867 (R. S. §§ 753 *et seq*).

Habeas corpus, under the first section of the act of Congress, of February the 5th, 1867, 14 Stats. 385.

Mr. *United States Attorney Farrow*, and Mr. *Assistant United States Attorney Thomas*, for petitioner, cited and relied upon the following authorities: Act Feb. 20th, 1812; Act of Aug. 23rd, 1842; 33rd Sec. Act of Sept. 24th, 1789; Act of May 31, 1870; U. S. Stats. vol. 4, 118, sec. 13; Id. vol. 1, 78 sec. 11; Rev. Stats. sec. 629; U. S. Stats. vol. 16, 142 sec. 8; U. S. Const. Art. 6 par. 2; Act of April 21, 1806; Bouvier, 533; Rev. Stats. sec. 753; 1 Wharton's Crim. Law, 185, 197; 2 Bishop's Crim. Law, sec. 987; The People v. Kelly, 38 Cal. 145; State v. Pike, 15 N. H. 83; State v. Adams, 4 Blackford, 146.

Hon. *N. J. Hammond*, Attorney-General of the State of Georgia, for respondent, cited Acts of Congress, 1794, sec. 1; Crimes act 1825, secs. 13, 26; Fox v. Ohio, 5 How. 421; Act of 1789, Bright. 301, sec. 1; 1 Wash. 232; 1 McAllister, 74; 3 How. 103; 5 McLean, 92, 100, 174; 1 Gall. 1; 2 Wall. Jr. 525; 3 Peters, 193; The People v. Kelly, 33 Cal. 145. And he argued, *inter alia*, that the *habeas corpus* act of Congress, of the 5th of February, 1867, is to amend said act 1789. It simply extends the power of United States Courts in *habeas corpus* to persons restrained of liberty in violation of the constitution, or any treaty or laws of the United States. See 14 Stats. at Large, 385. Its terms seem not to apply to cases where final judgment has passed, and the party is imprisoned in execution of sentence, and, if it applies to any new case this amendment nowhere repeals the proviso of the act of 1789, and Mr. Brightley under it cites the cases from McAllister's Reports *supra*, as showing the limit to the United States authority. What clause of the constitution of the United States—which law or treaty of the United States is violated by this prisoner being punished for purjury by a state court?

ERSKINE, J.—This is an application for a writ of *habeas corpus*, under the first section of the act of Congress, of February the 5th, 1867, preferred by Louis A. Guild, in behalf of Dock Bridges, a freedman, citizen of the United States and of this state.

It sets forth that Bridges is held in imprisonment in the state penitentiary without law or right, and in violation of the constitution and laws of the United States, charged with the crime of perjury against the laws of this state; that he is not guilty, or if guilty of any offence it is not against the state, but against the United States, and of which their courts have exclusive jurisdiction; that he was convicted and sentenced by the Superior Court of Randolph County, in said state, for eight years at hard labor, in said

penitentiary, for having committed perjury while testifying as a witness before a commissioner of the United States Circuit Court for the Southern District of Georgia, in a perliminary examination in a case of the United States against one Nicholas Kinney, arrested on a warrant issued by said commissioner, charging Kinney with being guilty of a crime against the laws of the United States —a violation of the Enforcement Act of May 31st, 1870—committed in said district, on the 7th of October, 1874.

To the petition is annexed a copy of the record of the proceedings in said superior court, containing among other matters the indictment, the petitioner's only plea—not guilty; names of the jurors, testimony of the witnesses, the verdict, motion for a new trial, the decision overruling it, and the sentence of the court.

I transcribe the bill of indictment, as it can not be easily abridged. Georgia, Randolph county, etc:

The grand jury, etc., in the name and behalf of the citizens of Georgia charge and accuse Dock Bridges [and four others] of the state aforesaid, of perjury:

For that the said Dock Bridges, etc., on the 22d day of October, A. D., 1874, and in the county aforesaid, there being then and there pending and under legal investigation before L. A. Guild, a lawful commissioner of the United States, exercising and holding jurisdiction in said county and state, a charge against Nicholas Kinney, for a violation of the enforcement act, passed by the Congress of the United States, and of force in said county and state, the said investigation being a proceeding under the execution of a warrant by D. C. Bancroft, Deputy United States Marshal, against said Nicholas Kinney, for the said offence of a violation of the enforcement act, and the said investigation being then and there a preliminary enquiry by L. A. Guild, United States Commissioner as aforesaid, to ascertain whether or not there existed probable cause for said charge against said Nicholas Kinney, then and there before the said L. A. Guild, who was then and there an officer aforesaid, lawfully authorized to administer an oath, who swore the said Dock Bridges, etc., as witnesses in the case aforesaid, the said witnesses then and there taking the oath upon the Holy Evangelists of Almighty God, and then and there, in the manner aforesaid swearing, did state under their oath as aforesaid, that the said Nicholas Kinney, in a threatening manner and with knife in hand, in the town of Dawson, of Terrell county, and said state, did attempt to prevent said Dock Bridges, etc., from voting, unless they should vote the democratic ticket, at an election being held at the court house in the town of Dawson, of Terrell county and said state, on the 7th day of October, A. D., 1874, for a member of the legislature to represent said county of Terrell in the general assembly of said state, which statement so sworn by said Dock Bridges, etc., was then and there material to the issue on trial in said case; whereas, in truth and in fact, the said Nicholas Kinney on the said 7th day of October, in the year 1874, at said election being then and there had and held in the town of Dawson as aforesaid, did not in a threatening manner, and with knife in hand, attempt in said town of Dawson to prevent the said Dock Bridges, etc., from voting at said election, unless they should vote the democratic ticket; and the grand jurors aforesaid, on their oath aforesaid, do charge that the said Dock Bridges [and four others], on the said 22d day of October, A. D. 1874, and in the said county of Randolph, and in the manner aforesaid, did wilfully, knowingly, absolutely swear to the aforesaid false statement, contrary to the laws of said state, the good order, peace and dignity thereof.

The petition prayed for the writ of *habeas corpus*, under the provisions of the act of February the 5th, 1867.

Mr. John T. Brown, principal keeper of the state penitentiary, to whom the writ was directed, returned that in obedience to it, he produced the body of Bridges before the court; but that as such principal keeper, he declined to surrender him, on the ground that he had been indicted and convicted of perjury in the Superior Court of Randolph County, Georgia, and which court sentenced him to eight years confinement at hard labor in the state penitentiary; that he holds him under that sentence; that no United States judicial authority has jurisdiction to enquire further into the cause of his detention; that it is only the Superior Court of Randolph County aforesaid that can legally enquire into it or discharge him from custody. So much of the return as questions the jurisdiction of a federal court or judge to enquire into the cause of the imprisonment of Bridges, was argued with ability (counsel for respondent relying principally upon the case of Ableman v. Booth, 21 How. 516). The objection was overruled by the district judge, and the marshal instructed to take Bridges into his custody during the pendency of these proceedings.

From the earliest period of the common law, no freeman could be detained in prison except upon a criminal charge, or civil action. In the former case it was always in his power to demand of the supreme court of criminal jurisdiction in the kingdom, a *habeas corpus* commanding the party restraining him to produce the body before the court, with the cause of detention, that it might enquire into its sufficiency, and either remand, bail or discharge the prisoner. This ancient barrier against oppression was, at Runnimede, built into that portion of the wall of the great charter which protects the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation. As is well established in legal history, this statute was confirmed many times by Parliament. And it was tersely said by Sir Edward Coke, during the debate in the House of Commons on the petition of right, "Magna Charta is such a fellow that he will have no sovereign." The very essence of the 29th chapter of the charter is, among other immunities from oppression, incorporated into the fifth article of amendment of the national constitution.

The framers of the constitution, actively mindful of the value of this remedy, guranteed its permanence by a provision in that instrument that its privilege shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. The Judiciary Act of 1789 provided that each of the several national courts, as well as either of the justices of the supreme court and district judges, should have power to grant the writ of *habeas corpus*, with the proviso, however, that it "shall in no case extend to persons in jail, unless where they are in custody under or by color of authority of the United States, or committed for trial before a court thereof, or are necessary to be brought into court to testify." And by the terms of the 7th section of the act of March 12, 1833, it may be granted, in all cases of a prisoner in jail, when he shall be committed on, or by any authority of law, for any act done, or omitted to be done, in persuance of a law of the United States, or any order, process or decree of any judge or court thereof. This was followed by the act of August 29th, 1842, which concerns international law. To give greater vitality to the writ, and to extend its efficacy, Congress passed the act of February 5th, 1867. The first section enacts: "That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty, to apply to either of said justices or judges for a writ of *habeas corpus*, which application shall be in writing, etc., * * * * and the said justice or judge to whom such application shall be made, shall forthwith award a writ or *habeas corpus*, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States. * * * * The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested; and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty," etc. See United States Revised Statutes, secs. 751–766, where the various *habeas corpus* acts are grouped.

The question for consideration is to me one of original impression, and it might have been determined elsewhere, and probably before now, had a different course been pursued in the state court; had the petitioner Bridges, on his arraignment there, demurred for want of jurisdiction appearing upon the record; that the offence charged was committed beyond the jurisdiction of that or any other

court of this state, and within the jurisdiction of another government; or shown these facts in evidence under the plea of not guilty; or, on return of the verdict, moved in arrest of judgment; and, if in any of these instances, the decision was adverse to him, or on the overruling of his motion for a new trial, he could have carried his case to the state supreme court—a tribunal presided over by judges of distinguished ability—and if that court affirmed the judgment of the lower tribunal, still he had the privilege to sue out a writ of error from the Supreme Court of the United States, and have the question re-examined there; but as a duty presented itself and has devolved upon me, it will be performed—performed, I trust, without marring the harmony or weakening the ties of comity between the state and national judicial authorities.

The judiciary power of every government can look beyond its own municipal laws in civil cases, and can take cognizance of all subjects of litigation between parties within its territorial limits and jurisdiction, though the controversy relate to the laws of a foreign country. But as regards crimes the rule is otherwise; for the courts of one state or nation will not hold cognizance of, nor enforce the criminal laws of another. And as to crimes made so by legislative enactments, the government of the United States stands in the same relation to the government of this state as any foreign power. Mr. Justice Story, in giving the opinion of the supreme court, in Martin v. Hunter, 1 Wheat. 304, said: "No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals."

Thus it is manifest that the state courts can not hold criminal jurisdiction over offences exclusively existing as offences against the United States; for every criminal prosecution must charge the crime to have been committed against the sovereign whose courts sit in judgment upon the offender, and whose authority can pardon him.

In Commonwealth v. Tenny, 97 Mass. 50, the Supreme Judicial Court of Massachusetts, held that the offence of embezzlement by a person in the employment of a national bank, located in that state, of the property of individuals deposited in such bank, not being punishable under any existing law of the United States, the state courts had jurisdiction thereof, under the state statutes. The court said: "There is no view of the relation of the concurrent power of the two governments, which affects the decision in the present case; for all courts and jurists agree that state sovereignty remains unabridged for the punishment of all crimes committed within the limits of a state, except so far as they have been brought within the sphere of federal jurisdiction, by the penal laws of the United States."

The language of the court in that case admits neither of doubt nor comment. It indicates in terms too significant to be misunderstood, that had Congress declared the act a crime, the state tribunals would have been altogether without jurisdiction over the offender.

In the State v. Adams, 4 Blackf. 146, the defendant was indicted for making a false affidavit of his being an actual settler on the public lands under the act of Congress of April 5, 1832. The court below quashed the indictment for want of jurisdiction, and on error to that court, the state supreme court affirmed the judgment. Said Blackford, J., in delivering the opinion of the court: "We have a statute saying, that any person who shall willfully and falsely make an affidavit, etc., shall be deemed guilty of perjury. Rev. Code, 1831, p. 186. And it is contended for the prosecution that the indictment before us is sustainable under that statute. But this doctrine can not be supported. The affidavit was made under an act of Congress relative to the sale of public land, and if the party making it committed perjury, he must be punished under the act of Congress prohibiting the offence. The state courts have no jurisdiction."

In the case of The State v. Pike, 15 N. H. 83, the prisoner was indicted for perjury alleged to have been committed before a commissioner in bankruptcy, appointed by the District Court of the United States, under the bankrupt act of 1841. On demurrer to the indictment the supreme court of judicature gave judgment sustaining the demurrer. Parker, C. J., announcing the decision said: "Here is another government whose laws are operative to a certain extent over the territory of the state, and having tribunals here competent to punish any offences committed against its laws, or in the course of any of its proceedings. The commissioners in bankruptcy not only derive no authority from this state, but they can not be regarded as having exercised their offices by any permission, tacit or otherwise, from it. They derive their authority from a paramount law, and the state could not object to the exercise by them of the duties of their office within its limits, if it had the disposition so to do. The offence, if committed as alleged, is clearly a crime under the laws of the United States."

Similar in almost every respect to the preceding and former cases, is the recent one of The People v. Kelly, 38 Cal. 145 (1869). Kelly was indicted in a county court for perjury, committed by swearing falsely as to a settlement and cultivation of a tract of land — part of the public domain of the United States. The prisoner demurred, on the ground that the state court had no jurisdiction of the offence, because it was not committed in any court of the state. The demurrer was overruled, and the prisoner convicted. On appeal to the supreme court, it was there held that the demurrer should have been sustained. In giving the opinion of the court, Sawyer, C. J, said: "The state tribunals have no power to punish crimes against the laws of the United States, *as such*. The same act may, in some instances, be an offence against the laws of both, and it is only as an offence against the state laws that it can be punished by the state in any event."

The Supreme Court of New York, in The People v. Sweetman, 3 Park. Crim. R. 358, on *certiorari* to the court of Oyer and Terminer, decided—reversing the conviction—that false swearing by a person in giving testimony in a proceeding of naturalization before a state court, is an offence against the United States, and is not punishable by a state court; because "the state court acted as the agent of the government, and was *pro hac vice* a tribunal of the United States."

In direct conflict with The People v. Sweetman, is Rump v. Commonwealth, 30 Pa. St. 475. Rump was convicted before the Quarter Sessions of Philadelphia, for having falsely and corruptly sworn before the District Court of the City and County of Philadelphia, on an application of a party to become a citizen of the United States. On error to the quarter sessions, the Supreme Court of Pennsylvania affirmed the judgment.

The act of Congress of April 14th, 1802, 3 Stats. 153, empowers, not only the Circuit and District Courts of the United States, and the territorial courts, but also state courts of record having common law jurisdiction, a seal and clerk, to admit aliens to national citizenship. Congress has, under the eighth section of the first article of the constitution, plenary power to pass naturalization laws, and, if it chooses, to bestow upon state tribunals authority, concurrent with the federal courts, to admit aliens to citizenship, in pursuance of the laws of Congress; and when the state courts, under sanction of state authority (for they are under no obligation to furnish tribunals for administering those laws) act upon the delegated authority, they, by the positive law, perform judicial functions. Prigg v. The Commonwealth of Pennsylvania, 16 Peters, 608.

Adverting for a moment to the cases of The State v. Adams, The State v. Pike, The People v. Kelly, The People v. Sweetman, and Rump v. Commonwealth (*supra*), it will be seen that in the first three the alleged offences were commited before United States officers empowered by Congress to administer oaths, and those state tribunals decided that they had no jurisdiction to punish the defendants. In the fourth case the corrupt oath was made before

a state tribunal, in a naturalization case, and on *certiorari* to the criminal court, the Supreme Court of New York reversed the conviction, holding that the United States Courts were the only tribunals that could punish the delinquent. Whether that case, or Rump v. Commonwealth is in consonance with the nature and genius of our form of government—in unison with those principles of state and national criminal jurisprudence which accompany our complex and, seemingly, but not really permiscible, system of polity—need not be resolved; for it is not a point in judgment. And for like reason it is unnecessary, and indeed would be too curious, to enquire whether there could be a second punishment of the defendant in the Pennsylvania case, for the same identical act—first, by the state laws and afterwards by the United States laws. Moore v. Illinois, 14 How. 13; *Ex parte* Lange, 18 Wall. 163. And see Mr. Bishop's learned and accurate Commentaries on Criminal Law, Vol. 1, 5th Ed. Secs 178, 179, 984-989. *Id.* Vol. 2, Sec. 1023.

Within the territorial limits of the individual states there exist two distinct and separate governments, each restricted in its sphere of action, and each independent of the other, except in one particular. "That particular," said Mr. Justice Field, in Tarble's case, 13 Wall. 397, "consists in the supremacy of the authority of the United States, when any conflict arises between the two governments. The constitution and laws passed in pursuance of it, are declared by the constitution itself to be the supreme law of the land, and the judges of every state are bound thereby, 'anything in the constitution or laws of any state to the contrary notwithstanding.'" * * * * And after making a quotation from Ableman v. Booth, 21 How. 506, which concludes thus: "And that in the sphere of action assigned to it" [the general government], "it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a state, or from state authorities." He adds: "And the judicial power conferred extends to all cases arising under the constitution, and thus embraces every legislative act of Congress, whether passed in pursuance of it or in disregard to its provisions. The constitution is under the view of the tribunals of the United States, when any act of Congress is brought before them for consideration."

Indeed it is essential to the very existence of the national government that its courts of justice should be wholly independent of state power to carry into effect its own laws.

The indictment (given in full in a former part of this opinion) charges the petitioner with having committed the crime of perjury against the laws of the state of Georgia, before L. A. Guild, a commissioner of the United States, lawfully authorized to administer an oath, in a preliminary investigation, on an accusation made against one Kinney, who was arrested by a United States deputy marshal on a warrant charging him with the offence of violating the enforcement act passed by Congress, by making an attempt to prevent the petitioner from voting at an election for a member of the legislature of said state.

By section 5392 of the Revised Statutes of the United States, it is provided that every person, who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly,—wilfully and contrary to such oath states any material matter which he does not believe to be true, is guilty of perjury.

As already mentioned, the petitioner is charged with having committed the alleged offence before a United States officer, in a proceeding then pending before him, being an examination into an accusation against a party for a violation of the fourth and fifth sections of the act of Congress of May 31st, 1870, 16 Stats. 141, commonly called the "Enforcement Act." It is entitled "an act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes." By the eighth section it is declared that the United States courts "shall have, exclusively of the courts of the several states, cognizance of all crimes and offences committed against the provisions of this act." See also 9th and 11th sections of the Judiciary Act of 1789; Revised Statutes, sec. 711.

Section 4460 of the code of this state declares that "perjury shall consist in wilfully, knowingly, absolutely and falsely swearing, * * * * or affirming in a matter material to the issue, or point in question, in some judicial proceeding, by a person to whom a lawful oath or affirmation has been administered;" and section 4461 prescribes the punishment. To my mind, it is clear that the words "judicial proceeding," as here used, refer solely to judicial proceedings under the laws of the state and its own tribunals of justice: no other meaning can be assigned to them. To extend their signification beyond this, would be an endeavor to empower state courts to invade the judicial authority of a distinct and separate government, and to punish persons for offences committed by them against the laws of another sovereign. The People v. Kelly, *supra*. The provision in the code defining the offence and naming the punishment, is a general law of the state. Now, keeping in view the complex character of our government—the dual relation which the individual states and the nation bear to each other—surely the texture of any argument must prove to be too frail, which would attempt to uphold the proposition that a crime committed in a judicial proceeding, before an officer of the United States, is a transgression of the criminal laws of a state. And as not impertinent to what has been remarked, it may be asserted, with entire confidence in its correctness, that no justice or judge of a court of the United States, nor a commissioner of a circuit court of the United States, can, as such officer, administer an oath for state purposes, or issue a process to arrest a party for a violation of state laws, or enquire into his guilt or innocence. Nor do these familiar acts of Congress, which have deputed state chancellors, judges and other magistrates to administer oaths, take acknowledgments, etc., in certain specified cases, in anywise affect what has just been said in regard to federal officers as such.

Pausing to observe the facts developed here, and the principles of law which arise from them, it may now be enquired whether a proceeding by *habeas corpus*, even under the provisions of the act of February 5th, 1867,—which empowers the several federal courts, and either of the justices or judges of such courts, to award the writ in all cases where a party is in custody in violation of the constitution, or of any law of the United States,—is a suitable and legal remedy to test the validity of the imprisonment of the petitioner, and to release him, if restrained of his liberty in contravention of the constitution or laws of the United States. It will not be questioned that upon a cursory glance at this cause,—which is a civil suit, although it be before a judge instead of a court (*ex parte* Milligan, 4 Wall. 1; and see Revised Statutes, sec. 763),—even the legal mind might be impressed with a doubt as to the appropriateness and legal soundness of this summary interposition. For thus to attempt to review a final judgment of a state tribunal of the highest original jurisdiction in civil and criminal causes, by a mode of procedure not conformable to the ancient and regular course heretofore used in the administration of justice between state courts and those of the Union, would be to authorize a federal judge to employ this writ as if it were a writ of error from a superior to an inferior tribunal. Such views may be plausible, but they do not convince; for it is obvious from the language of the act itself that it was not in the mind of Congress to give it the effect assumed,—to have done so, would have been to clothe a judge of a federal court with a power hitherto unheard of in national legislation. If, however, it be a legal fact that the Superior Court of Randolph County had jurisdiction of the offence and the offender, although the course of the court may have been irregular, and the conviction and judgment erroneous, the errors could not be corrected by a federal judge in a proceeding in *ha-*

beas corpus, or, by such officer, in any other way known to our jurisprudence.

But if the state court did not have jurisdiction of the case its judgment is utterly void, and the petitioner is restrained of his liberty in violation of the constitution, and the act of 1867 affords a proper and legal remedy to administer relief. If he committed the crime, as charged by the state in the indictment, the act was done within the authority and exclusive jurisdiction of the national courts; and, as they are the sole tribunals that could try him, so they alone could punish him. It follows necessarily, from what has now been stated, that every person who infringes the criminal or penal laws of a particular government, can be tried and punished by that government only. And it is not too strong an expression to assert that it is a fundamental right of every citizen of, or person commorant within the United States, to be tried by the tribunals of justice of that sovereign power whose criminal code he has transgressed; and the complement of this rule or axiom is immunity or exemption from trial or punishment for that offence by any other government or sovereignty. The disregarding of this immunity has deprived the petitioner of his liberty in contravention of the "law of the land;" he was proceeded against and condemned without "due process of law." The fifth article of amendment of the constitution declares, among other immunities from arbitrary oppression, that no "person shall be deprived of life, liberty or property without due process of law." This bulwark against invasion from the general government is extended by the fourteenth article of amendment, which forbids "any state" to "deprive any person of life, liberty or property, without due process of law." Mr. Justice Johnson, in Bank of Columbia v. Okely, 14 Wheat. 235, in speaking of the phrase "law of the land," and which means the same as "due process of law" (Cooley on Constitutional Limitations, 353), said that these words from Magna Charta were "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principle of private rights and distributive justice." An exposition which has received the unqualified approval of a jurist of the highest eminence. Id. 355.

As collaterally illustrative of the constitutional question as just presented, the fifteenth chapter of title thirteen of the Revised Statutes, *passim*, and sections 1778 to 1785 of Story on the Constitution, may be referred to.

As the crime is alleged to have been committed before a United States circuit court commissioner, at a place within the southern judicial district of this state, I am of the decided opinion that the federal courts for that district are the only tribunals that have cognizance of the offence and jurisdiction to try the party offending.

There is another provision in the constitution, directly pertinent to the question involved in this investigation, and which may be treated either as a distinct proposition or as a corollary to those already invoked. A little more than a year anterior to the passage of the amendatory *habeas corpus* act of 1867, the thirteenth article of amendment of the constitution was ratified. It ordains that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Mr. Justice Miller, in delivering the opinion of the court in the Slaughter-House Cases, 16 Wall. 72, said: "Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese Coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the states which properly and necessarily fall within the protection of those articles [thirteenth, fourteenth and fifteenth], that protection will apply, though the party interested may not be of African decent."

If, as already observed, the United States courts are the only tribunals that have jurisdiction over the offence, and power to punish the offender, then the petitioner has not had a trial under the provisions of the constitution; and it follows, from his imprisonment under sentence of the Superior Court of Randolph County, that he is held in "involuntary servitude"—a condition inhibited by the thirteenth article, "except as a punishment for crime whereof the party shall have been duly convicted."

Throughout this investigation the questions in controversy have been considered without any regard whatever to the fact that the petitioner is of the negro race. The proceeding came before me under the first section of the amendatory *habeas corpus* act of 1867. And where, in a case like this,—one, if I am not in error, that is fairly included, as well within the scope and true meaning of the language used by Mr. Justice Miller, speaking of the late amendments in the sentence last quoted, as within other provisions of the constitution which have been applied to the principles pervading this case,—the original or secured privileges and immunities of any person within the United States, or any place subject to their jurisdiction, are invaded, distinctions in races become incommensurable.

The decision of the district judge, is that the petitioner is deprived of his liberty in contravention of the constitution of the United States. But he declines to discharge him absolutely, for the following causes: He has been informed by the United States attorney, that an accusation stands against Bridges for the identical crime charged in the above indictment, and that this accusation can be investigated by the the grand jury of the United States Circuit Court for the Southern District of Georgia, which will be impanelled within a few days. And Attorney General Hammond, of counsel for respondent, having made application for an appeal to the circuit court, Dock Bridges will, therefore, be recommitted by the marshal to the jail of Fulton county, and there remain until further order: Matter of Mason, 8 Mich. 70; Matter of Ring, 28 Cal. 247; *Ex parte* Gibson, 31 Id. 619; Hurd on *habeas corpus*, 416, *et seq*; Revised Statutes, Sec. 763.

ORDERED ACCORDINGLY.

Contracts for Street Paving — Implied Power in Municipal Corporations to Contract Indebtedness.

DEXTER G. HITCHOCK *ET AL* v. THE CITY OF GALVESTON.

United States District Court, Eastern District of Texas, December Term, 1874.

Before Hon. WILLIAM D. WOODS, Circuit Judge.

1. The plaintiffs entered into a contract with the city of Galveston, by which they agreed for a stated compensation, to fill, grade, tamp, roll, curb and pave certain sidewalks in that city. The city agreed to pay for this work in its negotiable bonds, having fifteen years to run and bearing ten per cent. interest. The pavement was to be of asphalt of a given thickness and description. The contract contained a proviso that the plaintiffs should obtain the written consent of the owners of the property fronting or abutting on said sidewalks, to the laying down of the said pavement, which written consent, or selection of the said pavement was to be filed in the mayor's office with the city clerk. The plaintiffs, suing for damages for a breach of this contract, alleged that immediately after its execution, they entered upon the performance of the work and continued it at great labor and expense, for forty days, when they were compelled by the force and power and authority of the defendant to desist from and abandon the work, etc. The petition failed to aver that the consent of the abutting property-holders to the laying of the asphalt pavement, or any other kind of pavement, had been obtained. *Held*, on demurrer to the petition, that this contract was indivisible and created no obligation on the part of the city to pay for the filling, grading, tamping, rolling and curbing, unless the *paving* was also done. 2. That the obtaining of the consent of the abutting property-owners to the laying of the proposed pavement was a condition precedent to the right to maintain the action against the city, and that for failing to aver this, the petition was fatally defective. 3. That neither the city council, nor any committee of its appointment, had power to make the contract sued on. In arriving at this last conclusion, the following propositions are incidentally ruled: (1) The power to borrow money and issue bonds for sidewalk improvements must be conferred upon the city council of Galveston before that body can

assume to perform these acts. (2) This power is not inherent in a municipal corporation [following on this point Police Jury v. Britton, 15 Wall. 570, and Mayor v. Ray, 19 Wall. 486]. (3) It is not expressly conferred by, nor can it clearly be implied from, any provision in the charter of Galveston. (4) This power is excluded by provisions found in the charter: *a*. By the provisions for raising money by taxation for general and special purposes; *b*. By the provision for issuing bonds, which is limited to a specific purpose, that purpose not being sidewalk improvements; and, *c*. By the provision that the cost of sidewalk improvements shall be borne by the owners of the abutting lots, and shall be collected by assessments on the abutting property.

This cause was tried on the defendant's demurrer to plaintiffs' petition. Under the system of pleading which prevails in Texas, much of the evidence on which plaintiffs relied to sustain their cause was set out in the petition.

Mr. F. Charles Hume, for plaintiffs; *Messrs. Wm. P. Ballinger* and *George Flournoy*, for defendant.

WOODS, Circuit Judge.—The case as made by plaintiffs' petition is substantially as follows: On the 28th of February, 1874, the plaintiffs, as partners, entered into a contract in writing with the city of Galveston, by which they agreed for a compensation therein named, to fill, grade, tamp, roll, curb and pave certain sidewalks in the city of Galveston. This contract was made in behalf of the city by the mayor and the chairman of the committee of the common council on streets and alleys, by virtue and in pursuance of certain ordinances of the city council. The plaintiffs, the petition avers, immediately after the execution of the contract, entered upon the performance of the work, and continued it, at great labor and expense, for forty days, when they were compelled by force and the power and authority of the defendant to desist from and abandon the work, and, although always ready and anxious to perform the said contract and comp'ete said work, have ever since been wrongfully and wilfully forbidden and prevented by the defendant from so doing. The work done by the plaintiffs at the contract price was worth $18,194, and the profits on the unfinished portion of the work, not including the paving, would have been $127,990 57. For the aggregate of these two sums, to-wit: $146,184 57 and for $50,000 general damage, the plaintiffs ask judgment. The petition sets out, as exhibits, and as a part of itself, the contract in full and the several ordinances of the city council by authority of which it is claimed the contract was made. It is also averred, in an amended petition, that after its execution by the mayor and chairman of the streets and alleys committee, the contract was approved and ratified by the action of the city council.

It appears from the exhibits to the petition that by the contract upon which the suit is brought, the city of Galveston bound itself to pay to the plaintiffs, under the name of D. G. Hitchcock & Co., in the bonds of the city of Galveston, styled "Galveston City Bonds for Sidewalk Improvements," to be taken at par, a named rate for every square yard of pavement laid down by the plaintiffs upon certain sidewalks designated in the contract, said pavement to be composed of asphalt in bulk, rolled solid to the thickness of three inches; "provided, however, that the said D. G. Hitchcock & Co. obtain the written consent of the owners of the property fronting or abutting on said sidewalks to the laying down of the said pavement, which written consent or selection of the said pavement shall be filed in the mayor's office with the city clerk." The contract further bound the city to pay to the plaintiffs in the same bonds, to be taken at par, a specified price for the filling necessary to be done preparatory to the laying of the pavement, under which term of "filling" was included grading, tamping and rolling; also a specified price for the wooden curbing that might be needed or used in filling up and grading the said sidewalks preparatory to the putting down of pavement. The contract, after thus specifying the work to be done and the prices to be paid therefor, proceeds as follows: "In consideration of all the foregoing, the said D. G. Hitchcock & Co. bind themselves to lay down and fabricate the said pavement in the manner and style above set forth and stipulated; and they also bind themselves to fill, grade, tamp, roll and curb the said sidewalks as above set forth and stipulated, and to receive in payment for all said work the respective prices above stated, and in the bonds of the city of Galveston, styled 'Galveston City Bonds for Sidewalk Improvements,' at par."

The charter of the city of Galveston is a public act of the legislature of Texas. In section 8 of article 3 of title IV, it is provided that the city council shall have power "to establish, erect, construct, regulate and keep in repair, bridges, culverts and sewers, *sidewalks* and crossings. * * * The cost of construction of sidewalks shall be defrayed by the owners of the lot or part of lot or block fronting on the sidewalk, and the cost of any sidewalk constructed by the city shall be collected, if necessary, by the sale of the lot or part of lot or block on which it fronts, together with the cost of collection, in such manner as the city council may by ordinance provide, * * * and the balance of the proceeds of sale, after paying the amount due the city and costs of sale, shall be paid by the city to the owner." Section 2 of the same article and title declares that "the city council shall not borrow for general purposes, more than $50,000. Section 3. That the city council shall have power "to appropriate money and provide for the payment of the debts and expenses of the city." Section 4. That the city council shall have power "to povide by ordinance, special funds for special purposes, and to make the same disbursable only for the purpose for which the fund was created."

The ordinances set out in the petition as authority, by virtue of which the contract sued on was made, are two ordinances approved August 19, 1873; an ordinance approved October 21, 1873, and an ordinance approved February 3, 1874. The first ordinance (approved August 19, 1873), authorizes and directs the mayor and chairman of the committee on streets and alleys "to make a contract or contracts with proper and responsible parties to fill up, grade and pave the sidewalks on both sides of the hereinafter named streets, and to curb the same, and for this purpose they are hereby directed to advertise for the period of thirty days for bids or proposals to fill up, grade, pave and curb in part or in whole, the sidewalks herein named." The ordinance then proceeds to specify the sidewalks to be thus improved. Section 2 of this ordinance as amended by section 1 of the ordinance of October 21, 1874, provides that "said sidewalks shall be paved with either of the following materials: Asphalt, hard bricks, laid in a bed of Portland cement and properly grouted; concrete, made of Portland cement, mixed with other proper materials; or with tiles or stone, laid in a bed of Portland cement; and the curbing around the same shall be made of the best hard brick and capped with a plank of heart pine, three inches in thickness and twelve inches wide, properly fastened to the curbing with the necessary iron bolts." Section 5 of the same ordinance provides that "the cost of filling, raising, curbing and paving each separate sidewalk, as soon as the same shall be finished and completed, shall be a charge against the property abutting and fronting thereon, and shall be assessed against the same in the following manner." The section then declares how the cost of the work shall be assessed against the property, and that it shall be a lien thereon until paid. Section 6 provides that the assessment shall be paid in five annual installments, with interest.

On the same day that this ordinance was approved another was approved, which authorized the mayor to have printed or engraved coupon bonds of the city of Galveston to the amount of $250,000, to be styled "Galveston City Bonds for Sidewalk Improvements;" to draw interest at ten per cent., and to be payable to the bearer in 15 years, provided that the city council should have the right to redeem at par any or all of said bonds at any time after five years from their sale or disposition. This ordinance also provided that the assessments made on property for the construction of sidewalks, should, as they were collected, be appropriated to the payment of the interest on said bonds, and to form a sinking fund to pay the principal at their maturity or when redeemed. The ordinance of the 3d of February, 1874, provided

that sidewalks on both sides of certain other streets therein named should be filled up, graded, curbed and paved; and it then proceeds to direct "that the sidewalks shall be filled up to the grade established by the civil engineer, and curbed with cypress wood, stone or brick, and a pavement six feet in width, laid in the center of the same—the said pavement to be composed of either asphalt, hard brick laid in Portland cement, or other proper materials, tiles or stone." This ordinance authorized the mayor and chairman of the streets and alleys committee "to make a contract or contracts with proper and responsible parties, to fill up, grade, curb and pave the said sidewalks," and directed that the cost of the work should be assessed against the owners of the lots in the same way as prescribed in the ordinance of August 19, 1873.

All these facts appear either from the petition of plaintiffs or from the charter of the city of Galveston, of which, being a public act, the court takes judicial notice. The defendant alleges numerous grounds of demurrer, many of which I do not think well taken. As in my opinion some of the grounds of demurrer are well taken, it is not necessary in this opinion to notice particularly those which are overruled. The first ground of demurrer is the general one that the facts stated in the petition are not sufficient in law for the plaintiffs to have and maintain their action against the defendant.

I pass over the question whether the city council could delegate the authority to the mayor and chairman of the streets and alleys committee to make the contract in question. Let it be conceded that the power of these two officers was as full as the power of the city council itself to make the contract. The question meets us at the threshhold of the plaintiffs' case. Have they made the necessary averments to entitle them to a recovery, conceding that the contract was a valid one and binding on the city of Galveston?

The ordinances by virtue of which the mayor and chairman of the committee acted, are to be considered in giving construction to the contract. These officers act as the agents of the city, and the contract recites that it is made in accordance with the authority vested in them by the city council. It is to be presumed that the agents of the city made the contract in pursuance of the powers conferred upon them, and the plaintiffs, being bound to know the extent of the authority of the agents with whom they were contracting, made such a contract with them as they were authorized to make. Story on Agency, sec. 73. Both the ordinances which empower the mayor and chairman of the committee to contract, require them to enter into contracts with responsible parties "to fill up, grade, curb and pave the sidewalks designated." It is clear to my mind that this is authority to contract for filling, grading, curbing and paving, and not for filling and grading without curbing or paving. It was not necessary for the mayor and chairman to contract with the same party to do all the work. But they were required to contract to have all this work done by somebody. The mayor and chairman so construed their authority, and entered into the contract with the plaintiffs, by which the plaintiffs bound themselves "to lay down and fabricate the said pavement in the manner and style above set forth and stipulated;" and also "to fill, grade, tamp, roll and curb the said sidewalks, as above set forth." The authority given to the city by its charter was to construct "sidewalks," the ordinances contemplated the construction of sidewalks, and the chief end and purpose of the contract was the construction of sidewalks. The filling, grading and curbing were only the preparatory steps necessary to the completion of a sidewalk by the putting down of the pavement. The main purpose and the ultimate object was the pavements. No sane man supposes for a moment that the city council desired to raise a bank of sand in front of the lots of the citizens and leave it so, or that such was the purpose of the ordinance or the contract. If the city council had not decided to complete the sidewalks by paving them, they would not have entered upon the work at all. So the contract was intended to provide for paving as well as filling, grading and curbing, and did provide for it. It is clearly not the purpose of the contract that a part of the work should be done and not the residue. The plaintiffs agree to do the whole. The performance of a part only, without the consent of the city council, is no performance, and does not entitle the plaintiff to a recovery. If there is a condition precedent to the performance of a part of the contract, and the contract is an entirety, that condition precedent must be performed or the whole contracts fails.

Now, what does the contract provide? The plaintiffs agree to fill, grade and curb and to pave with asphalt. There is no covenant to pave with anything else. But the contract says, in effect, you shall not pave with asphalt unless you obtain the written consent of the owners of the property abutting on the sidewalks to the laying down of an asphalt pavement, which written consent or selection shall be filed in the Mayor's office with the City Clerk. Now, it seems to me clear that the obtaining of the consent is a condition precedent to be performed before any part of the contract is binding on the city. The plaintiffs agree to fill, grade, tamp, curb, etc., preparatory to the laying down of an asphalt pavement, and then to lay the asphalt pavement if the owners of the property will consent. It is not to be supposed that if they were prevented from completing a sidewalk, by the refusal of the property-holders to consent to an asphalt pavement, the contract authorizes them to do the work simply preparatory to the laying of a pavement, and then leave it in that unfinished condition. How do we know but that the inducement to pay the price specified for grading, etc., was in the fact that the plaintiffs had agreed to lay the asphalt pavement for the specified price? The city of Galveston has agreed by this contract, to pay $1 25 per cubic yard for the filling, grading, tamping and rolling of a sidewalk, preparatory to the laying thereon of an asphalt pavement, and then to pay the price of $1.75 per square yard for the laying of an asphalt pavement. It has never agreed to pay the sum named for the work necessary to be done preparatory to the laying of any other than an asphalt pavement. This contract must be taken as a whole. The presumption is, that the price of one part of the work depends upon the price agreed upon for another part. The price allowed by the contract for the filling and grading and curbing may have afforded the plaintiffs a profit, while the price for paving would have afforded none, or even entailed a loss. That this is not mere conjecture is shown by the fact that the petition claims damages for the profit lost in the grading, etc., ranging from one to two hundred per cent., while it claims no loss of profit on the paving. Can the plaintiffs be allowed to pick out the profitable parts of the contract for performance and abandon the unprofitable? The plaintiffs have agreed to do the whole. They can not do the whole according to the contract; they can not be in a position to perform in full, unless they have the consent of the property-holders, in writing, to the laying down of the particular pavement mentioned in the contract, and that consent is filed in the office of the Mayor. They must perform the whole contract, and they can not, according to the terms of the contract, perform it without compliance with the conditions precedent. In other words, no part of the contract is binding on the city, unless the other party to the contract has first obtained the consent of the property-holders to the laying down of the pavement selected.

There is no averment in the petition that such consent has been obtained, and without such consent the petition is fatally defective. Jennings v. Moss, 4 Texas, 452; Frazier v. Todd, Id., 461. The demurrer must therefore be sustained, on the ground that the petition does not set out facts sufficient to entitle the plaintiffs to recover.

2. It is objected that the city council had no power, either through an agent or by its own ordinance, to make the contract sued on in this case. The contract contemplates the issue by the city of Galveston of bonds to the amount of $250,000, with ten per cent. interest, due in fifteen years, or redeemable, if the city so elects, after five years, to pay for work to be done under

the contract. The contract can not be performed without the issue of the bonds provided for in the ordinance of August 19th, 1873. It is denied that the city of Galveston has power, either express or implied, to issue the bonds for the purposes named in the contract, and we think the demurrer to the petition fairly presents the question. I am unable to find any authority in the city charter, either express or clearly implied, to issue bonds or borrow money for the purpose of constructing sidewalks. To pay out bonds is, in effect, a selling of them, or a borrowing of money on them. Rogers v. Burlington, 3 Wall. 666; Middleton v. Alleghany Co., 37 Penn. State, 241; Leybert v. Pittsburg, 1 Wall. 272.

The clauses from the city charter already cited, and which are referred to by plaintiffs' counsel as containing the authority, do not confer any express authority to borrow money for other than general purposes, nor is the authority clearly implied. The power expressly given to appropriate money and to provide for the payment of debts and expenses of the city, to provide special funds for special purposes, to construct sidewalks, and to assess the cost of their construction upon the owners of the abutting lots, are powers usually found in city charters; but no fair intendment can be drawn from this of a power to issue bonds and borrow money upon them for special purposes. The reasonable construction, therefore, is, that money to pay debts and expenses and to provide special funds, is to be raised by the means for raising money expressly given by the charter, namely: by taxation or special assessment, and not by the issue of bonds, which is only authorized for one special purpose. As these means are prescribed, any any other means not expressly given, seem to be excluded. The power to borrow money and issue bonds not being expressly given by the charter, and not being clearly implied from any of its provisions, the question is presented whether the city of Galveston, or any other municipal corporation, has this power without legislative authority expressly given or clearly implied. It appears from the ordinance approved August 19, 1874, authorizing the issue of bonds in question, and which is an exhibit to the petition, that the bonds were to be coupon bonds, payable to bearer at a future day. Both the bonds and coupons, therefore, had all the qualities of commercial paper. Mercer Co. v. Hackett, 1 Wall. 83; Myer v. Muscatine, 1 Wall. 384; Gelpke v. Dubuque, 1 Wall. 175; Moran v. Miami Co., 2 Black, 733. The charter expressly declares in Title V, which is exclusively devoted to this subject, that the city council shall have power within the city, by ordinance, to annually levy and collect taxes, not exceeding one per cent., on the assessed value of all real and personal estate and property in the city, and provides for various other methods of taxation; and Title VI prescribes the method to be pursued for the collection of taxes. There is authority given by the charter to issue bonds; but that is for one special purpose, and that purpose is not the construction of sidewalks. See Title IX, Art. 1, Sec. 1, where the authority to issue said bonds is restricted to a single object, and carefully limited and restrained.

The question is, therefore, fairly presented, whether the city of Galveston was invested with implied power to borrow money for the construction of sidewalks, and issue therefor its negotiable bonds and coupons, payable to bearer and due at a future day.

Judge Dillon, in his work on Municipal Corporations, section 407, says: "Banking and trading corporations have implied or incidental power to make negotiable paper, and the same rule has, in some cases, been applied to municipal corporations. The ordinary warrants of such corporations, it is clear, do not cut off equities, and it is at least doubtful how far they have the implied power to make paper which shall have this effect. The adjudged cases on this point are conflicting." The learned author (section 406), says: "In the author's judgment, the better opinion is, that there is no implied power in the officers of a town, county or city corporation, to issue warrants or orders which shall be free from equities in the hands of holders; that the existence of such a power is not necessary as an incident to those ordinarily granted, or to carry out the purposes of the corporation, and would be attended with abuse and fraught with danger.

These views are sustained by recent decisions of the Supreme Court of the United States. In the Police Jury v. Britton (15 Wall. 570), the court says: "We have, therefore, the question directly presented in this case, whether the trustees or representative officers of a parish, county, or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness." In answering this question the court says: "The power to issue such obligations and thus irretrievably to entail upon counties, parishes and townships, a burden for which they have received no just compensation, opens the door to immense frauds on the part of petty officials and scheming speculators. It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which was always to be enquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing for county or parish trustees to incur obligations for work actually done in behalf of the county and parish and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations, which may be multiplied to an indefinite extent. If it be once conceded that trustees or other local representives of townships, counties and parishes, have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated." And so the court held that the officers of a parish, county or other local jurisdiction invested with the usual power of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have no implied authority to issue negotiable securities payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous debt. The only difference between the case first cited and the case under consideration, is, that the former was the case of a parish in Louisiana and the latter the case of a city in Texas. The questions raised and decided in the case of the Police Jury v. Britton are identical in all other respects with those presented in this. I feel bound to follow this authority until overruled, because it is the judgment of the court of last resort, and also because I heartily approve it.

In a more recent case (The Mayor v. Ray, 19 Wall. 468), the same court held that neither the power to borrow money nor to issue commercial paper therefor belongs to a municlpal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied. This decision is made, it is true, by a divided court, but there is no dissent from the proposition decided in the case of The Police Jury v. Britton, *supra*. The point of difference between the judges seems to have been whether certificates of debt, city warrants, orders, checks, drafts, and the like, used for giving to public creditors evidence for the amount of their claims, are, or are not commercial paper, so that the holder takes them free from legal and equitable defences, and with an absolute obligation on the part of the municipal corporation to pay them. But as I read the case there does not appear to be any dissent from the general proposition, unless it be by Mr. Justice Hunt, that a municipal corporation, with power of taxation given it for the purpose of raising means to carry on its functions, can not raise money by issuing or selling its coupon bonds due at a future day, and payable to bearer, without legislative authority expressly given or clearly implied.

These two decisions by the Supreme Court of the United States, are a law to this court which it follows with willing steps. A construction of the charters of municipal corporations, which without the express permission of the legislative power gives their officers the power to issue bonds, having all the qualities of commercial paper without limit as to amount or time of payment—gives an opportunity for the most stupendous frauds, and presents a temptation to their perpetration to a class of officials who, as the history of the country shows, are frequently rapacious and unscrupulous. One of the great evils of these times is the increase in the amount of the indebtedness of counties, towns and cities. The facilities which have been supposed to exist for the borrowing of money and the issuing of bonds by their local jurisdiction, have fostered extravagance, fraud and peculation, and loaded the people with burdens grievous to be borne. The result has been that the prosperity of cities has been destroyed, and the property of the inhabitants subjected to a public mortgage, in many cases equal in amount to the value of the property itself.

The assumption of authority by municipal corportions to issue bonds by virtue of their general corporate power is a recent one. It has always been denied by many courts of the highest respectability. In my judgment it should never have been admitted. So dangerous a power should be expressly and deliberately conferred, so that the tax-payer may be protected by prudent guards and limitations. Whenever the power to issue bonds may become necessary for the prosecution of some work or improvement, involving large cost, or for any other purpose, the power can be conferred by the legislature, with proper restrictions. But in my judgment no such authority ought to be implied from the general grant of corporate powers.

But it seems to me that provisions of the charter of the city of Galveston clearly exclude the power to issue bonds to pay for sidewalk improvements. The same section of the charter (Sec. 8, Art. 3, Title IV), which confers upon the city council the power to construct sidewalks, points out with minuteness and precision the manner by which the cost of their construction is to be defrayed. There is no escape from the language, "the cost of construction of sidewalks shall be defrayed by the owners of the lot or part of lot or block fronting on the sidewalk," and "the cost of any sidewalk constructed by the city shall be collected, if necessary, by the sale of the lot on which it fronts." Here is a designation of the person who is to pay and of the manner by which payment is to be enforced. These provisions exclude any other method of payment. They clearly exclude the idea that the city may pay for such pavements by issuing its coupon bonds bearing ten per cent. interest, and payable to bearer in fifteen years. The Mayor v. Ray, 19 Wall. 468. It is no answer to this to say that the city may, nevertheless, enforce payment from the owners of the lots. Suppose the lots do not pay the cost of the sidewalks? The city, by its issue of bonds, has made itself liable and will have the deficiencies to meet. The city could not be made liable for these deficiencies if it had not assumed the liability by the issue of its bonds. Lake v. Williamsburg, 4 Denio, 520; McCullough v. The Mayor of Brooklyn, 23 Wend. 458; Baldwin v. Oswego, 1 Abbott, 62; New Albany v. Sweeney, 13 Ind. 245. The city undertakes to pay in the first instance for these sidewalks, and to take the risk of reimbursing itself from the property owners. This is a clear departure from the authority conferred by the charter. "A corporation can act only in the manner prescribed by the act of incorporation which created it." Head v. Insurance Company, 2 Cranch, 127. The city can not assume a primary liability for these improvements. Rock v. Mayor of Newark, 33 N J. Law Rep. 131; City of New Albany v. Sweeney, 13 Ind. 245; McCullough v. Mayor of Brooklyn, 23 Wend. 458.

The ordinance of August 19, 1873, which provides for the construction of the sidewalks, also declares that the cost of their construction shall be a charge against the property fronting thereon, and shall be assessed against the same. It then prescribes how the assessment shall be paid or its collection enforced. This, it seems to me, exhausts the power of the city council on this subject. It surely could not have been within the contemplation of the legislature that the city council, after taking these steps specially authorized by the charter, and amply sufficient for the payment of the cost of the sidewalks, should then prove that the city itself should assume the primary liability, advance the cost for the lot-owners, by an issue of its coupon bonds, payable to bearer in fifteen years.

My conclusions on this branch of the case may therefore be summed up as follows:

(1.) The power to borrow money and issue bonds for sidewalk improvements must be conferred upon the city council of Galveston, before that body can assume to perform these acts.

(2.) This power is not inherent in a municipal corporation.

(3.) It is not expressly conferred by, nor can it clearly be implied from, any provision in the charter of Galveston.

(4.) The power is excluded by provisions found in the charter.

(*a*.) By the provisions for raising money by taxation for general and special purposes.

(*b*.) By the provision for issuing bonds, which is limited to a specific purpose, and that purpose not being sidewalk improvements.

(*c*.) By the provision that the cost of sidewalk improvement shall be borne by the owners of the abutting lots, and shall be collected by assessments on the abutting property.

In my judgment the assumption by the city council of authority to issue these bonds for sidewalk improvements, was not only unauthorized by the charter, but a clear and flagrant violation of its meaning and spirit.

The result of the views above expressed is:

1. That the plaintiffs have not by the pleadings shown a good cause of action against defendant, for want of an averment that they had performed the condition precedent, which was necessary to be averred in order to show a contract, which even if authorized, was binding upon the city; and,

2. That neither the city council of Galveston, nor any committee of its appointment, had authority to make the contract sued on. It is, therefore, absolutely null and void.

The demurrer to the petition of plaintiffs as amended is therefore sustained.

Legislative Power to Regulate Railway Tariffs.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY v. THE ATTORNEY GENERAL OF IOWA, *ET AL.*

United States Circuit Court, District of Iowa, May 12, 1875.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. **State Regulation of Railways.**—Where a railway company has been organized under a general law of a state, which confers upon such companies "the power to make contracts," but does not in express terms confer on them the exclusive power to fix their own tolls and compensation, the state may afterwards pass laws regulating such tolls and compensation.

2. ——. **Legislative Reservation of Right to make Rules and Regulations.**—The United States granted to the state of Iowa certain lands for the purpose of constructing a described railway within the state. The legislature of Iowa accepted the trust, and conferred the donation upon a particular company, with the reservation that such company should at all times be subject to such rules and regulations as might from time to time be enacted and provided by the general assembly, "not inconsistent with the provisions of this act, and the act of Congress making the grant." *Held*, that this was an express reservation on the part of the state, of the power to regulate the compensation which should be received for the carriage of freight and passengers over such road.

3. ——. **Validity of Act which prescribes Different Rates for Different Roads.**—A state law which divides the railroads in such state into different classes, based upon the amount of their earnings per mile, and which prescribes a rate of charges for the roads of each class different from the rates prescribed for each of the other classes,

is not obnoxious to a constitutional inhibition against the passage of laws not uniform in their operation.

Bill for an Injunction.

On the 23d day of March, 1874, the legislature of the state of Iowa passed an act entitled, "An act to establish reasonable maximum rates of charges for the transportation of freights and passengers on the different railroads of this state. Acts of 1874, p. 61.

This act classifies all of the railroads within the state, according to their gross annual earnings per mile, and provides in substance that railroads earning $4,000 per mile and over (Class A.), shall not charge more than 90 per cent. of the fixed rate; that roads earning $3,000 per mile (Class B.), shall not charge over 5 per cent. above the fixed rate; and roads earning $2,000 per mile (Class C.), shall not charge over 20 per cent. in addition to the fixed rate; and that they shall not charge respectively for passengers more than Class A., three cents, Class B., three and one-half cents, and Class C., four cents per mile.

The present suit is brought by the Chicago, Burlington and Quincy Railroad Company, of Illinois, as the lessee in perpetuity, under legislative authority, of the Burlington and Missouri River Railroad Company of Iowa, to enjoin suits by the attorney-general of the state, for the enforcement of the above mentioned railway tariff act of March 23, 1874. The bill rests upon the ground that the act last named is in conflict with the constitution of the United States, in that it impairs the obligation of a contract, and is also a regulation of inter-state commerce; that it is also repugnant to the constitution of the state, for the reason that it does not affect all railroads alike, and is therefore not of uniform operation; and for the further reason that it conflicts with section one of the bill of rights.

The answer admits most of the allegations of the bill, but denies that the B. and M. R. R.Co., either by the charter or the laws of Iowa, had the *exclusive* right and power to fix its rates of fare, and denies that any attempt is to be made to enforce the law, so far as regards inter-state commerce.

It is averred in the answer that, if the B. and M. R. R. Co. ever did have such exclusive right, it yielded such right by its acceptance of the land grant in A. D. 1856, under the conditions stated in the act granting said lands. That since the original charter was granted, and after the adoption of the new constitution of Iowa in A. D. 1857, said charter has been amended in many material respects; and that by the acceptance of such amendments the charter became subject to amendment or repeal by the general assembly, under the provisions of said constitution conferring that power and right upon the general assembly; and that it especially applies to the Red Oak branch, which was constructed by virtue of an amendment to the charter made in A. D. 1869; that as to the other branch roads, they were constructed by the aid of taxes levied and collected in various townships under the act of 1870, which provided that all roads constructed by such aid, "shall be subject to the control of the general assembly, in regard to management of the same, and the charges for transportation of freight and passengers."

On the bill, answer and certain exhibits and affidavits, the complainant moves for the allowance of a temporary injunction to restrain the enforcement of the act of March 23, 1874.

O. H. Browning, *D. Rorer* and *James Grant*, for the complainant; *M. E. Cutts*, attorney-general of Iowa, and *W. H. Seevers*, for the respondents.

DILLON, Circuit Judge.—Whatever rights the complainant corporation has, are derived from the Burlington and Missouri River Railroad Company. It will be conceded for the purposes of the present application that the complainant possesses all the franchises, rights and powers of the Burlington company, and is entitled to the relief here sought if the last named company would have been entitled thereto, if it were itself using and operating its road. An enquiry into the rights of the Burlington company as respects compensation for services rendered by it, becomes necessary. This company was incorporated in 1852. The constitution of the state then in force provided that "corporations, except for political or municipal purposes, shall not be created by special laws, but the general assembly shall provide, by *general laws for the organization of all other corporations*."

Under this provision of the constitution the legislature, in 1851, passed a general act for the creation of corporations for pecuniary profit, including railway corporations. No express power to alter or annul the articles of association of companies organized under the act, was reserved. Code, 1851, Art. 43, pp. 108 and 109.

It was under this general incorporation act that the Burlington company was organized in 1852.

By this act it was provided (Code, 1851, sec. 673), that "any number of persons may associate themselves and become incorporated for the transaction of any lawful business, including the establishment of ferries, the construction of canals, *railways*, bridges, or other works of internal improvement; *but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided*."

The next section (674), enumerates the powers of corporations organized under this act as follows:

1. "To have perpetual succession.
2. "To sue and be sued by its corporate name.
3. "To have a common seal which it may alter at pleasure.
4. "To render the interests of the stockholders transferable.
5. "To exempt the private property of its members from liability for corporate debts except as herein otherwise declared.
6. "*To make contracts*, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy.
7. "To establish by-laws and make all rules and regulations deemed expedient for the management of their affairs, in accordance with law, and not incompatible with an honest purpose."

This, then, is the extent of the corporate powers and franchises of the company; and they are but little greater than those which the law "tacitly, and without any express provision, considers inseparable from every corporation," created for a like purpose. Angell & Ames on Corp., sec. 110; 2 Kent Com. 224.

The complainant seeks an injunction in this case, not on the ground that the maximum rates of charges allowed by the act of 1874 are unreasonable, but on the ground distinctly asserted in the argument, that the company has the exclusive power to fix the measure of its own compensation, and consequently that such an enactment as that of 1874 is a violation of its chartered rights.

In considering this claim of the company, it can not fail to arrest attention that the statute nowhere *in terms* confers upon railway corporations organized under it, the power to fix or regulate their charges. We have, then, to deal with a case where the legislature has not expressly delegated to the company the power to fix its own tolls or compensation.

When we consider the rule of construction, as it is definitely settled in Great Britain and by the courts of this country, that any ambiguity or fair doubt in the charters of corporations, operates in favor of the public, and that a corporate body can claim nothing not clearly granted, it is quite plain that the general power "to make contracts, the same as individuals," can not be held to amount to a contract between the state and the company, that the latter should exclusively and permanently prescribe and regulate its own charges. The surrender of legislative power beyond recall, in so important a matter, can not, in my judgment, be implied from any such general language.

Undoubtedly the railroad company may demand compensation for its services. It can not be imagined that the legislature supposed the capital necessary to construct and operate railroads would be invested therein except for the hope of profit to be thereby realized; and there is no source of profit to a railway

company except its earnings for the transportation of persons and property.

I have no difficulty, therefore, in holding that the legislature, either by the express power "to make contracts," or, what seems the more satisfactory ground, by just and necessary implication, did authorize railway corporations to demand and receive compensation for their services; but this is far short of conferring upon them an *exclusive* power in this respect, and one beyond future legislative control.

In all civilized countries the duty of providing and preserving safe and convenient highways to facilitate trade and communication between different parts of the state or community, is considered a governmental duty. This may be done by the government directly, or through the agency of corporations created for that purpose. The right of public supervision and control over highways results from the power and duty of providing and preserving them. As to ordinary highways these propositions are unquestioned. But it is denied that they apply to railways built by private capital and owned by private corporations, created for the purpose of building them. Whoever studies the nature and purposes of railways constructed under the authority of the state by means of private capital, will see that such railways possess a two-fold character. Such a railway is in part public, and in part private. Because of its public character, relations and uses, the judicial tribunals of this country, state and national, have at length settled the law to be that the state, to secure their construction, may exert in favor of the corporation authorized by it to build the road, both its power of eminent domain and of taxation. This the state can not do in respect of occupations or purposes private in their nature. A way thus authorized and established is intended for the public use and benefit, although the capital is furnished by the corporators or shareholders, and the tolls belong to them. In its public character a railroad is an improved highway or means of more rapid and commodious communication, and its public character is not divested by the fact that its ownership is private. These general views have been asserted by many state courts, but in this court it is sufficient to refer to the judgments of the Supreme Court of the United States, in the cases of Olcott v. The Supervisors, 16 Wall. 678; Railroad Co. v. County of Otoe, 16 Wall. 673; and the very recent cases known as the Topeka and Iola tax cases,* the opinions in which were given by the presiding justice of this court.

In its relations to its stockholders, a railroad or the property in the road and its income is private property, and subject to the lawful or reserved rights of the public, is invested with the sanctity of other private property. The distinction here indicated marks with general accuracy, the extent of legislative control except where this has been surrendered or abridged by a valid legislative contract. Over the railroad as a highway and in all its public relations, the state, by virtue of its general legislative power, has supervision and control; but over the rights of the shareholders, so far as these are private property, the state has the same power, and no greater, than over other private property.

The power which the state may legitimately exercise over railways within it is subject to such further restrictions as it may have consented to by express grants in charters in respect of which no power of repeal or alteration is reserved, and by the commerce-clause of the federal constitution, which withdraws inter-state commerce from state control, and confines the state to the regulation of its internal traffic. As our railroad system is made up of links supplied under the authority of the several states, it may admit of doubt in our present knowledge, whether a power in a state thus limited can be beneficially exercised, but this is a legislative problem and not a judicial question.

Without further enlarging upon the public nature and uses of railways, or undertaking to review the authorities cited, or examine the positions assumed by counsel, which would necessarily lead through a broad field of discussion, I content myself, on this branch of the subject, with stating as my conclusion, that the legislature has not expressly conferred upon railway corporations in this state the exclusive power to fix their own charges; that such a power can not be deduced by implication from the constituent act of the corporations, and that whatever powers are conferred in this respect, are subject to an implied condition that they shall not be oppressively or unreasonably exercised, and also subject to the future exercise of the police regulations of the state, or any other power possessed by the state, properly legislative in its nature, which includes the power to regulate, consistently with the charter, all of the franchises granted, and to prescribe and limit the amount of toll or charges which it shall be lawful to take.

This view, if sound, is decisive of the case against the railroad company. But if we should concede it to be erroneous, and that the company originally possessed chartered rights which the act of 1874 would violate, still it has surrendered any such right by it sacceptance of the act of July 14, 1856. On the 15th day of May of that year, Congress made a grant of lands to the state of Iowa, "for the purpose of aiding in the construction of a railroad from Burlington, on the Mississippi river, to a point on the Missouri river, near the mouth of the Platte river." The state could dispose of the lands for the sole purpose of building the line of railway, but it had the absolute power to select the company which should receive the benefit of the grant. The legislature accepted the trust by the act of July 14, 1856, and by that act gave the benefit of the grant to the Burlington Company upon condition that it should assent to the provisions of that act, which it did. Among the provisions of the act thus assented to by the company was the following: "That the company accepting the provisions of the act, shall at *all times be subject to such rules and regulations as may* from time to time be enacted and provided by the General Assembly of Iowa—not inconsistent with the provisions of this act, and the act of Congress making the grant." Rev. 1860, Sec. 1311.

The state of Iowa sustained towards these lands the relation of trustee of the general government, and in that capacity could not divert or change the trust, but it also sustained towards any company on which it should confer the benefits of the grant the relation of a sovereign, and as such was capable of enacting any valid law whatever, not in conflict with the act of Congress making the grant. The State had the power, therefore, to say to the donee of its bounty, we will give you the benefit of this grant of lands provided you will agree to be at all times subject to such rules and regulations as the general assembly may enact. The company accepted the grant, and thereby agreed to be subject to this condition. The only question then, is as to the extent of the power recognized or given by the words "rules and regulations." The interpretation of these words must depend upon their occasion and purpose.

The occasion was an important one both for the company and the state. The company was made the beneficiary of a large and valuable grant of lands. The state was endeavoring to secure for the benefit of the public the building of an important highway or line of communication from the Mississippi to the Missouri river.

Doubts as to the extent of the power of the state over the corporation, under the then existing legislation, suggested the provision in question, and it was undoubtedly the design of the legislature to secure a substantial right to the state, or a recognition by the company of such a right in the state. It is to be regretted that words were not used which would admit of no dispute, but as it is we must interpret those employed so as to effectuate the intention of the parties. Some aid to interpretation is afforded by the decisions of the Supreme Court of the United States, in respect of the word "regulate" as it occurs in the federal constitution. These are referred to in the recent case of Hamilton v. Dillin.

* 2 CENT. L. J. 156.

In this case it was held under the act of July 13, 1861, that power to authorize commercial intercourse, during the rebellion, "to be conducted and carried on only in pursuance of rules and regulations prescribed by the secretary of the treasury," authorized the secretary to impose as a condition of cotton permits, a tax of four cents a pound on cotton purchased. The following observations of Mr. Justice Bradley, in the case last cited, are pertinent to the case in hand. The learned judge says:

"It is contended that the imposition of the bonus of four cents per pound was not a '*rule*' or a '*regulation*' within the fair meaning of the act; and it is conceded that in many cases the power to make rules and regulations on a particular subject is a limited power, having respect to mode and form, and time and circumstance, and not to substance. But it also must be conceded that in other cases the power is much more extensive and substantial. Thus in the constitution, the several powers 'to regulate commerce,' 'to establish a uniform rule of naturalization,' 'to make all needful rules and regulations respecting the territory or other property belonging to the United States,' are understood to give plenary control over those subjects. The power to regulate commerce has been held to include the power to suspend it (1 Kent 432); and the power to make rules and regulations respecting the territory of the United States, has been held to include the power to legislate for and govern such territory, and establish governments therein. (4 Wheat. 422; Story on Con., § 1,328). The extensive effect given to these clauses is undoubtedly largely due to the character of the instrument and that of the donee of the powers, to-wit, the legislature of the United States, to whom the grant of a power means the grant of a branch of sovereignty. It shows, however, that the rule of construction depends, at least, in some sort, upon the nature of the subject-matter. In the case before us, the power of the government to open and regulate trade with the enemy was intended to be conferred upon the President and Secretary of the Treasury. The power of regulation in such a case is to be taken in the broadest sense, and, in our judgment, included the power to impose such conditions as the President and Secretary should see fit."

So in the case before us, the legislature of the state is the donee or possessor of the power to make the rules and regulations in question, and the power is to be construed accordingly, and not in a narrow and technical sense. Any construction that deprives words of a substantial purpose or meaning, would plainly thwart the purpose intended to be effected. The words, when carefully considered, satisfactorily evince a purpose of subjecting the companies to the control of the legislature. The language is that "the company accepting the grant shall, *at all times*, be subject to such rules and regulations as may, from time to time (that is, as occasion arises), be enacted and provided by the General Assembly of Iowa," and the only limitation named is, that they shall not be inconsistent with the act of July 14, 1856, or the land grant act of Congress.

Such rules and regulations are, necessarily, *laws*. Referring to this subject counsel say that these words "can justly be construed only to refer to what is called the public and general management of the road as a highway, and not to change the vital, life-giving principle of the charter to the corporation, to regulate its own tariffs." But the power to regulate the public and general management of the road as a highway existed before, and the interpretation suggested is open to the objection of making an important provision to which the company was expressly required solemnly to assent, useless and unavailing. The legislature, by this provision, meant, in my judgment, to put at rest any question that might then exist as to the subordination of the corporations accepting the grant to the legislative power of the state, so far as, consistently with the preservation of their franchises, the public good might from time to time require.

The act of 1874 is not void for want of uniformity, or because it does not prescribe a uniform rate for *all* railroads in the state.

There may be good reasons connected with the cost of construction and expense of operating, and the amount of earnings, why railroads of one class should be allowed to charge more than roads of another class. The law is uniform in its operation upon all roads in each class; and similar acts, as for example, dividing cities into classes, with different powers, are not uncommon in our legislation, and their validity has been sustained by the courts. The cases cited in the brief of the attorney-general fully establish this proposition.

I need not discuss the objection made by the bill to the act of 1874, as interfering with inter-state commerce, since the answer expressly disclaims any intention to enforce, or attempt to enforce, the act in this respect.

INJUNCTION DENIED.

Correspondence.

CURIOSITIES OF THE LAW REPORTERS.

TOPEKA, KANSAS, May 15, 1875

EDITORS CENTRAL LAW JOURNAL:—In Hubbard v. Moore, 24 Louisiana, 591 (collected also in 13 American Reports, 128), the plaintiff, a furniture dealer, sued the defendant, a female residing at New Orleans, for $2,167.15 balance due for furniture sold and delivered. She defended on the ground that the furniture was furnished by the wicked plaintiff "to be used in a house of prostitution kept by her," and that the transaction was one "reprobated by law, and contrary to good morals."

But Taliaferro, J., in a short but luminous opinion exposed the fallacy of her plea, and laid down the great principle, that furniture dealers may sell to whomsoever they please. Hear him: "To the vicious and depraved, as as well to the good and virtuous, belongs the right to acquire the needs and comforts of a common humanity. A different doctrine would adopt the visionary notion 'that there is to be no more cakes and ale.'"

The soundness of the above view of the law must be apparent to every fair mind at a glance, resting as it does upon the authority of that venerable, but somewhat festive jurist, Sir Toby Belch. It is well calculated to arrest the progress of "visionary notions," and to inspire a sincere respect for constitutional principles.

Let the old worthy sleep in peace, assured that there shall continue to be cakes and ale.—"Yes by St. Anne; and ginger shall be hot i' the mouth, too."

G. R. P.

RAILROAD BONDS—PRIORITIES—ANSWER TO "X." (*ante*, p. 304).

KANSAS CITY, MO., May 11, 1875.

EDITORS CENTRAL LAW JOURNAL:—My answer to the above query is in the negative. The question, in brief, is this:

A series of bonds, of even date, are issued by a railroad company, and payment secured by a mortgage upon the debtor's property. A majority of the bondholders cancel some of the coupons on their bonds, and the common debtor gives them new bonds of the same tenor and date, in exchange for the originals held by them, with a guaranty of payment by a third party endorsed thereon. Do the original bonds not so exchanged, have a prior lien upon the mortgaged property over the substituted bonds?

I say no; because the bonds are merely evidences of the indebtedness secured by the mortgage, and until the debt is paid the mortgage is not affected by the taking of additional *personal* security, cancellation of coupons, or changing the form of the written evidence of indebtedness. The same rule would apply to bonds as to notes, and the security remains though the note is renewed, extended or destroyed, where others are not prejudiced. McDonald v. Hulse, 16 Mo. 503; Hill. on Mort. Ch. 17; Thornton v. Irwin, *et al.*, 43 Mo. 153; Chouteau *et al.* v. Thompson *et al.*, 3 Ohio St. 424; Patterson v. Johnson, 7 Ohio, 225; Brinkerhoff v. Lansing, 4 Johns Ch. 66. It is not even necessary that the date should be evidenced by other writing than the mortgage. Brant v. Robertson, 16 Mo. 143. The mortgage would be sustained even though the debt is set out in the deed differently from what it is in the bond, where others are unprejudiced. Scott v. Baily, 23 Mo. 140; 46 Mo. 404.

In this case the mortgage is given to secure the indebtedness represented by the entire series of bonds. They all fall due at one and the same time, and the creditors who hold the substituted bonds have done nothing to prejudice the holder of the ten originals. They all have a common interest in the security, and are equally entitled to its benefits. In case of a deficiency in the fund to satisfy the whole debt, a distribution should be made among the bondholders *pro rata*. 2 Redf. Am. Railw. Cases, 674, *et seq.*

Respectfully submitted, W. P. W.

Book Notices.

HORTENSIUS: AN HISTORICAL ESSAY ON THE OFFICE AND DUTIES OF AN ADVOCATE. By WILLIAM FORSYTH, LL. D., Q. C., M. P., author of "Life of Cicero," etc. *Second edition, with illustrations.* London: John Murray, Albemarle St. 1874.

This appears to be a reprint, without additions, of the first edition, of which Mr. Murray was also the publisher. There is no preface to the second edition, nor indeed anything to indicate that it is a new *edition*,—that is, that it has been *revised* or *edited*. The original preface is given with the date, "Inner Temple, Feb. 1, 1849;" and on the title page it is recited that "the right of translation is reserved." We are particular to mention these facts, because this is the original, of which the book which we noticed recently (p. 305), under the title "History of Lawyers, Ancient and Modern," is the counterpart. The plates of that work are very close imitations of the plates of this; and the matter of the two books, is, as far as we have examined, in all respects the same. This edition, though a little more expensive, is much the more elegant of the two, and besides is not tainted with the suspicion that its publication involves an effort to deceive the public as to its identity; but on the other hand, Mr. Murray has reproduced it under the name which its distinguished author gave it when he first sent it forth to the world.

THE PSYCHOLOGICAL AND MEDICO-LEGAL JOURNAL. April, 1875. Conducted by WILLIAM G. HAMMOND, M. D. New York: McDivitt, Campbell & Co.

Contents of this number: Monomania as affecting Testamentary Capacity—a learned and philosophical paper, by Edward Patterson, E q., read before the New York Medico-Legal Society. Chronic Localized Basilar Meningitis, by Dr. T. B. M. Cross. Observations on European Insane Asylums, by Dr. L. A. Tourtellot. A new Dynameter, by Dr. Allan McLane Hamilton.

MANUAL OF POLITICAL ETHICS. By FRANCIS LIEBER, LL. D. *Second edition.* Revised. Edited by THEODORE D. WOOLSEY. 2 vols., 8vo, cloth, $6 00. Philadelphia: J. B. Lippincott & Co. For sale by Soule, Thomas & Wentworth.

The author of this work (born in Berlin, in 1800), lived a restless and wandering life in Europe, as a scholar and a revolutionary politician, until 1827, when he emigrated to the United States and soon found a prominent position in our literary circles. In 1829 he undertook the editing of the first edition of the Encyclopædia Americana. In 1835 he was called to the chair of History and Political Economy in South Carolina College. While in this position he published the works on which his reputation now chiefly rests, namely: "Political Ethics," 2 vols., 1838 (of which this is the second edition); "Legal Political Hermeneutics, or the Principles of Interpretation and Construction in Law and Politics," 1839; "Laws of Property," 1842; "Civil Liberty and Self-Government," 2 vols., 1853, and several monographs on Penal Law and the penitentiary system, and other tracts of less permanent interest. These treatises date back to the last generation,—and although the one before us is not properly either a law book, or a new book,—it is a standard work so long "out of print," and it bears so closely upon the public relations into which lawyers are often called, that it deserves at least brief mention in our columns.

The two volumes constituting the "Political Ethics," are divided, somewhat arbitrarily, into six books, of which the first is entitled "Ethics in General; Political Ethics Defined;" the second, "The State;" and the other five are grouped under the general head of "Political Ethics." We summarize their contents as follows: Book III. Individual Motives of Political Action. Book IV. Education and Association among Citizens. Book V. The Duty of the Citizen as to Voting and Parties. Book VI. The Duties of a Representation. Book VII. The Duties of the Executive and Judiciary. In Book IV. there is a discussion of the duties and responsibilities of the press; and Book VII. ends with a general dessertation upon War.

The whole substance of the work might be condensed, without omission of any essential statement or argument, into half a volume; but the author spends so much time in preliminary definitions, reasons so much in circles, so amplifies and illustrates his propositions, and digresses into so many by-paths, that the work assumes volumuous proportions. There is not much apparent system or method in his treatment of the subject, and his thought, especially in the abstruser portions of the introduction, is occasionally so befogged that the reader needs close application and a keen attention to discover exactly what the learned doctor is driving at. But with all its faults of style and method, the work exhibits such a range of reading and research, and treats a vital subject from such a pure and lofty position, that it deserves perusal, and in some parts attentive reperusal, at the hands of every thoughtful man.

The only portions peculiarly interesting to lawyers, as lawyers, are the brief sections in which the nature of Law, and the duties of Judge, Juror, Advocate and Witness, are discussed. The lawyer occupies, however, whether he will or no, a prominent position in the political world of the West, and is looked to as a leader by so many elements in society, that a treatise on Political Ethics, is by no means a valueless work in his library. If he knows and uses the busy reader's best privilege of "skipping a page" now and then, when Dr. Lieber strays from his subject, he may course through this interesting essay with both benefit and satisfaction. It is to be hoped that the publishers will feel encouraged to publish also the "Legal and Political Hermeneutics," which comes closer to our profession than the "Political Ethics."

President Woolsey's editorial labor has been confined to a brief preface, a few original notes,—less than two hundred lines in all,—and the insertion in their proper places of thirty or forty short notes, found among the author's manuscript. It is to be regretted that a publicist so well known, and so highly esteemed as Dr. Woolsey, has not seen fit to add more of his own comments upon subjects he is eminently fitted to discuss. S.

REPORT OF THE TRIAL OF LEAVITT ALLEY, INDICTED FOR THE MURDER OF ABIJAH ELLIS, IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. Reported by FRANKLIN FISKE HEARD. Boston: Little, Brown & Company. 1875.

This is an interesting case of circumstantial evidence. On the sixth day of November last, the body of Abijah Ellis was found packed in barrels and floating in North river, near Cambridge. The case was "worked up" by the police, and two days afterwards Leavitt Alley was arrested, charged with the murder. The evidence adduced against him was wholly circumstantial. The trial was conducted before Justices Wells and Morton of the supreme judicial court. Hon. Charles R. Train, attorney-general, and John Wilder May, Esq., district attorney, prosecuted the case efficiently for the commonwealth. Gustavus A. Somerby, Esq, and Lewis S. Dabney, Esq., defended the prisoner with skill and ability. The trial lasted nine days, and resulted in the acquittal of the prisoner.

The first thing which strikes us on opening this book, is the absurdity of that system of pleading which obliges or permits the indictment to be divided into a number of distinct *counts*, each one alleging the commission of the same crime, with some variation from the others. In this case the variation relates (as it generally does) to the weapon used, and the manner of the killing. The first count alleges that the killing was done with an axe; the second, with a club; the third, by choking; the fourth, "by some means, instruments and weapons to the jurors unknown." Now the last count was the only one which told the truth; and in the name of common sense (if there is any such thing in common law pleading) why was it not sufficient? Neither the grand jurors nor any one else knew in what manner the killing was done. Why, then, was it not sufficient to charge a willful and malicious killing in a manner to the jurors unknown? The system of pleading which requires such a rigmarole, seems little better than barbaric nonsense, and that law which can not get above it, can hardly be called a science.

In charging the jury, Judge Wells let fall a remark which is worth noticing. Speaking of reasonable doubt, he said, "a man might so cultivate a doubt as not to be able to believe anything; but such a doubt would not be a reasonable doubt."

To the curious and thinking, not the least valuable part of this book is the notes which the learned editor has added by way of an appendix, culled from his extensive reading. These consist mainly of observations of eminent judges and writers on the following subjects: Arraignment; Sentence on an Indictment for Murder after a Plea of Guilty; View (of the spot in controversy); Credibility of the Testimony of the Police; Dangers peculiar to Circumstantial Evidence; Mr. Justice Grier's Charge; Charge of Chief Baron Pollock; Distinction between Real and Circumstantial Evidence, if real. Useless; General Worthlessness of the Testimony of Experts; The Viva Voce Examination of Witnesses; Difference as to he Effect of Evidence in Civil and Criminal Proceedings; Moral Certainty: The Duty of Counsel as to Stating to the Jury his own Belief as to the Guilt or Innocence of the Prisoner; The Verdict of, Not Proven; Maxim "Hearsay is not Evidence"—Inaccuracy of it; Hearsay often confounded with *Res Gestæ*; Evidence of Police Officers.

The volume has a good index and a table of cases, and is printed in the best style of John Wilson & Son.

A TREATISE ON THE LAW OF EXECUTIONS. By HENRY M. HERMAN. New York: James Cockcroft & Co. 1875.

The title of this work does not give an adequate idea of its comprehensive scope. It not only treats of the writ of execution, but also of final process in general, of sales thereunder, of the property subject to sale, of the requisites of valid sales, of the rights of puchasers at judicial sales, and of the liability of the officer for negligence or want of skill on the execution of final

process. The work is in reality a treatise on judicial sales as well as on execution or final process. It contains 640 pages without the index, and 768 pages including the index.

The aim of the author seems to have been to collect *all* the decided cases upon the topics which come under his treatment. His industry is unmistakeably manifested by the full citation of cases. In this volume over 9,000 cases are referred to; thus enabling a lawyer having occasion to trace any given point back from the text-book to the adjudications, to do this with the least possible labor. No book yet published, so fully collects the cases on the subjects of executions and judicial sales as the present one.

The text, in general, is confined to a brief statement of the point decided in the cases cited, showing wherein the cases agree and wherein they conflict. The author rarely indulges in disquisition or essay writing, and his book is doubtless more useful in consequence. To have done more than to give the exact point in the cases cited, with the utmost brevity, would have been impossible within the compass of a single volume, having so comprehensive a scope as the present. We notice occasional inaccuracies of style, and here and there obscurity of statement, owing, doubtless, to the desire to condense; but the reader will cheerfully pardon minor faults of this character arising from such a cause. The merit of this work is to be found in the labor which it embodies, and in the valuable aid which it will afford to the busy and overworked lawyer and judge, for whom the author has saved many wearisome hours in the search of authorities which are nowhere else so fully cited as in this volume. The book is elegantly printed, and contains a graceful dedication to Mr. Justice Miller of the Supreme Court of the United States.

J. F. D.

Legal News and Notes.

—No one will implicitly trust any text-book unless he wishes to be misled.—[*The Solicitors' Journal.*

—Mr. District Judge Brooks, of North Carolina, in charging the federal grand jury at Wilmington on the 4th instant, advised them that the civil rights law is unconstitutional.

—Orlando F. Bump, Esq., author of Bump's Bankruptcy Practice, will assume the editorial management of the Bankruptcy Register Reports with the next number, which commences volume twelve.

—Mr. Russell Gurney, recorder of London, and formerly member of the high joint commission, which initiated the settlement of the Alabama controversy, has been elected a fellow of the Royal Society.

—We may now expect a fresh batch of revenue decisions; for the government agents are raiding the distilleries. We hope our readers will not get alarmed; we shall not publish many of them. Those who desire to keep posted on such matters should take the Internal Revenue Record.

—The West Virginia legislature has passed a dog law by which it is provided that any person may kill any cur found chasing or injuring sheep; that the owner of the dog shall be liable for the damage done, and the owner of any dog which has been found worrying sheep, shall within forty-eight hours kill the dog, under a penalty of $1.50 for each day the dog is suffered to live after notification has been given of its evil deeds.

—Ex-Chief Justice George W. Woodward, of Pennsylvania, died at Rome recently. He was born at Bethany, Wayne county, Penn., in 1809; he was educated at Hobart College, Geneva, N. Y., where he was a classmate of Horatio Seymour and Henry S. Randall; he commenced to study law in 1830 at his native place; and in 1852 he became supreme court judge. He held other judicial positions and was member of Congress. In recent years he has been devoted to antiquarian researches.

—And now after all the extravagant enthusiasm of the native population over Mr. Serjeant Ballantine, who went to India to defend a native prince, the Guikwar of Baroda, on the charge of attempting to poison a British official, Mr. Fitzjames Stephen, Q C., has had the unprofessional discourtesy to write to the Pall Mall Gazette, charging two things: 1. That there is no doubt of the Guikwar's guilt. 2. That there was no backbone to the defence. Query: If there was no "backbone" to the defence of a criminal undoubtedly guilty, how came it that that defence was so far successful as to secure a mistrial?

—The Albany Law Journal should be more careful to distinguish in its news items between the corresponding departments of the state and national governments, or else its English exchanges should take judicial notice of the fact that when that journal says "Supreme Court" it means the Supreme Court of New York, and that when it says "Senate" it means the Senate of New York. One of those journals recently informed its readers that the Supreme Court of the United States had decided a certain question, which had in fact been decided by the Supreme Court of New York; and now the English Law Times tells us, on the authority of the Albany Law Journal, that "a bill has been introduced into the American Senate to abridge the forms of deeds, mortgages and covenants."

—In the chapter on Contributory Negligence, in Dr. Wharton's book on Negligence, occurs the following caustic criticism of a rule declared by the English courts to which the Solicitors' Journal is unable to see any answer: "The English law on this point presents an extraordinary contrast. On the one side it is held that the negligence of a person having charge of a young child is the negligence of the child and imputable to the child, and that there is no redress if the child is negligently run over. On the other side it is held that though oysters are negligently placed in a river bed, it is an injury redressable by damages for a vessel to negligently disturb them. The child, were he an oyster, would be protected; but as a child, under analogous circumstances of neglect, he is without redress."

—Judges and Prizefighters.—A correspondent of The London Times writes: 'It is my misfortune to be old enough to remember attending the Tennis Court in Little St. James street, Haymarket, when Tom Spring sparred on a stage with Jack Langan, Josh Hudson with Tom Cannon, and Aby Belasco with Whiteheaded Bob. That famous building is still visible, but it no longer attracts peers and commoners. It was either in 1828 or 1829, during the summer assizes, that two cases of killing by prizefighting came before two very remarkable judges at different circuits. One of the judges was Sir John Alan Park. He declared that, if a case of killing came before him, and the prisoner was convicted, he would have the convict 'to be hanged by the neck.' The other judge was Sir William Draper Best, who admired the pugilistic art, and declared that, so long as that way of settling differences was predominant, we should never hear of stabbing with the knife. It was not until fights were bought and sold, and the rough element was overwhelming, that this 'manly practice' was 'put down,' to the exceeding delight of Sir Peter Laurie."

—It is not generally known (writes the London correspondent of the Dundee Advertiser) that a considerable amount of insurance speculation is carried on in the lives of eminent persons. There is scarcely a well-known individual in this country whose life is not insured by numbers of persons, and whose death does not involve an appreciable drain on the resources of the insurance office. The age, health, and general condition of eminent persons are either known or easily ascertained, and companies therefore are always ready to issue a policy on their lives. It is said, for example, that the Queen's life is insured by hundreds of persons, and that numbers of loyal subjects have also a pecuniary interest in the death of the heir-apparent. Eminent statesmen are also the subjects of the same sort of speculation, and probably even now some surly and money-making radicals take a peculiar interest in Mr. Disraeli's gout and bronchitis. These speculators are not always successful. The late Lord Brougham's life was a favorite subject of this description of investment, but he lived so long that most of the policies were allowed to lapse, and the insurance offices had by far the best of the speculation.

—Intermarriage within the Prohibited Degrees.—A singular case came before the magistrate at the Marylebone Police Court on Tuesday, in which a mother sought to bastardize her own children. The parties to the proceedings, who were nephew and aunt by the half-blood on the father's side, and first cousins on the mother's side, were married in February, 1871, and afterwards cohabited together as man and wife, two children being the issue of the connection. Disputes having arisen between them, it was now contended for the wife (on an application by her against the father to contribute towards the maintenance of her children) that the marriage was void, as being within the prohibited degrees of affinity. The magistrate said that before the passing of the act 5 & 6 Will. 4, c. 54, the marriage would have been a voidable one, and to set it aside, proceedings must have been taken in the ecclesiastical court, but under that act all marriages within the prohibited degrees of consanguinity or affinity were made absolutely null and void *ab initio*. The act, therefore, rendered it necessary for him to decide in the first place whether th marriage in question was void, and whether the parties were within the prohibited degrees of consanguinity. Among the prohibited degrees were mentioned the two following: "A woman may not marry her brother's son." "A man may not marry his father's sister." In the present case the parties stood in that degree of relationship to each other by the half-blood, in addition to being first cousins of the whole blood. As first cousins their marriage was of course valid, but as aunt and nephew it was bad, if the half-blood ranked in the same degree as the whole blood under the prohibited degrees, and although the reasons for it, no doubt, were weaker, all the authorities went to show that in reckoning the degrees the half-blood made no difference. Consequently the marriage in question being between relatives in the third degree, was void. The case cited from Bacon's Abridgment (Tit. Marriage [A.]), Oxenham *et uxor* v. Gayre, was on all fours with the present case, reversing only the sexes of the parties.—[*The Solicitors' Journal.*